



1 **I. BACKGROUND**

2 This case arises from two of Plaintiff's parole hearings while incarcerated in the Nevada  
3 Department of Corrections ("NDOC"). Plaintiff was convicted of sexual assault pursuant to  
4 Nevada Revised Statutes ("NRS") §§ 200.364 and 200.366, and sentenced to life with the  
5 possibility of parole after ten years. (First Am. Compl. at 9, ECF No. 11). The sentencing court  
6 additionally issued Plaintiff a consecutive sentence of eight to twenty years. (*Id.*). Plaintiff was  
7 nineteen years old when he was charged, and his victim was sixteen-years-old. (*Id.*). Neither of  
8 Plaintiff's convictions were under NRS § 213.1255, which is for a sexual offense against a  
9 child under the age of fourteen. (*Id.*).

10 Plaintiff's first parole hearing occurred on February 20, 2013. (*Id.*). Plaintiff alleges that  
11 at the 2013 hearing the Parole Board Defendants denied Plaintiff parole based on the false  
12 premise that Plaintiff had sexually assaulted a thirteen-year-old child. (*Id.*). Plaintiff further  
13 alleges that in 2013, prison officials categorized Plaintiff as a "moderate risk to re-offend."  
14 (*Id.*). After Plaintiff appealed his denial, Plaintiff asserts that the Parole Board Defendants  
15 admitted the Parole Board made a mistake, and acknowledged that Plaintiff's victim was  
16 sixteen-years-old and not thirteen. (*Id.*). Although the Parole Board allegedly admitted this  
17 mistake, they denied Plaintiff a rehearing. (*Id.*).

18 Plaintiff's second parole hearing occurred on March 16, 2016. (*Id.*). At the 2016  
19 hearing, Plaintiff alleges that the Parole Board Defendants once again conducted the hearing  
20 under the pretense that Plaintiff was convicted of a sexual offense against a child under the age  
21 of fourteen pursuant to NRS § 213.1255. (*Id.* at 9–10). Plaintiff asserts that NDOC Defendants  
22 Yates, Williams, and Garofalo submitted this false information in their February 11, 2016  
23 parole report out of retaliation for Plaintiff's filing of multiple grievances. (*Id.* at 10). Because  
24 the Parole Board Defendants relied on this allegedly false information, Plaintiff contends that  
25 he was once again unfairly denied parole consideration. (*Id.*).

1 Plaintiff appealed the 2016 denial and requested a rehearing, which Parole Board  
2 Defendant Keeler denied. (*Id.* at 11). Keeler’s denial stated that Plaintiff was correct that he  
3 was not convicted of the sexual assaults under NRS § 213.1255; and that because of the error,  
4 the Parole Board had struck the two sexual assaults from consideration and from the record.  
5 (*Id.*). Keeler also stated that the Parole Board had issued a new order on May 11, 2016, to  
6 correct the false reports. (*Id.* at 12–13). However, Plaintiff notified Keeler that the new denial  
7 order continued to state that Plaintiff’s victim was under the age of fourteen. (*Id.* at 13). Keeler  
8 replied that a few years’ age difference did not change anything. (*Id.*).

9 Further, Keeler informed Plaintiff that Garofalo returned a high-risk assessment for  
10 Plaintiff even though the Parole Board had returned a moderate risk. (*Id.*). According to  
11 Keeler, however, the Parole Board had to use the higher assessment. (*Id.*). Because of the  
12 assessment, Keeler strongly encouraged Plaintiff “to focus [his] energy on working with NDOC  
13 treatment staff to bring [his] sexual offense assessment below the high risk category.” (*Id.*).

14 Plaintiff filed his Amended Complaint on October 24, 2016. (First Am. Compl., ECF  
15 No. 11). On June 10, 2017, the Court issued its Screening Order, (ECF No. 16), where the  
16 following claims survived: (1) retaliation; (2) violations of the equal protection clause; (3)  
17 violations of the due process clause; and (4) violations of the ex post facto clause. On August  
18 22, 2018, the Court dismissed Plaintiff’s claims against the Parole Board Defendants with  
19 prejudice. (Order 17:7–9, ECF No. 88). The Court also denied Plaintiff’s motion for summary  
20 judgment and motion for a preliminary injunction. (*Id.* 17:10–17).

21 Plaintiff now requests that the Court amend its August 22, 2018 Order on the ground  
22 that the Court misinterpreted the allegations in his First Amended Complaint and did not  
23 consider Plaintiff’s claims in his pending Second Amended Complaint, which the Court had not  
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1 granted leave to file at the time of the Court's Order.<sup>2</sup> (Mot. Am. 2:16–23, ECF No. 93).  
2 Additionally, Plaintiff again seeks a preliminary injunction against Defendants and a new  
3 parole hearing. (Mot. Prelim. Inj. at 2, ECF No. 92).

## 4 **II. LEGAL STANDARD**

5 “[A] motion for reconsideration should not be granted, absent highly unusual  
6 circumstances.” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted).  
7 Reconsideration is appropriate where: (1) the court is presented with newly discovered  
8 evidence, (2) the court committed clear error or the initial decision was manifestly unjust, or (3)  
9 if there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah Cnty v.*  
10 *ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

## 11 **III. DISCUSSION**

### 12 **A. Motion to Alter or Amend Order**

13 Plaintiff's Motion to amend the Court's prior Order relates to Plaintiff's due process  
14 claim against the Parole Board Defendants. The Court previously dismissed Plaintiff's due  
15 process claim against the Parole Board Defendants on the ground that Plaintiff did not have a  
16 right to parole, and thus could not allege a due process violation associated with the decision to  
17 deny parole. (Order 9:9–10:16, ECF No. 88). Plaintiff emphasizes in his Motion to amend that  
18 his due process claim was not entirely about the denial of parole. Rather, his claim relied on  
19 his right to have the parole board follow their own internal guidelines during a parole hearing,  
20 which the Parole Board Defendants allegedly did not do. (Mot. Am. at 4, ECF No. 93). As  
21 explained below, Plaintiff is correct: his allegations resemble a viable due process claim against  
22 the Parole Board Defendants for failure to follow internal guidelines in a parole hearing.

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25 <sup>2</sup> The Court construes Plaintiff's Motion to Alter or Amend Order, (ECF No. 93), as a motion for reconsideration.

1           The determination of a due process claim involves a two-step analysis. First, the Court  
2 asks, “whether there exists a liberty or property interest which has been interfered with by the  
3 State.” *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). The second step asks,  
4 “whether the procedures attendant upon that deprivation were constitutionally sufficient.” *Id.*  
5 With the first step, “[a] liberty interest may arise from either . . . the due process clause itself or  
6 state law.” *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2009) (quoting *Toussaint v.*  
7 *McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986)). The guarantees of the Fourteenth  
8 Amendment apply only when a constitutionally protected life, liberty, or property interest is at  
9 stake. *See Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003); *Nunez v. City of L.A.*, 147 F.3d  
10 867, 871 (9th Cir. 1998). Prisoners, however, have “no constitutional or inherent right” to  
11 parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).

12           Though Nevada has not created a liberty interest in the grant of parole, eligible Nevada  
13 inmates “have a statutory right to receive proper consideration for parole.” *Anselmo v. Bisbee*,  
14 396 P.3d 848, 853 (Nev. 2017). Thus, a Nevada parole board violates an inmate’s due process  
15 rights when it considers inapplicable aggravating factors during that inmate’s parole hearing in  
16 violation of internal guidelines. *Id.*

17           Here, Plaintiff’s due process claim is based, in part, on allegations that the Parole Board  
18 Defendants applied improper procedures and inapplicable aggravating factors during Plaintiff’s  
19 parole board hearings. For example, Plaintiff alleges that Defendants considered incorrect  
20 sexual assault convictions against Plaintiff, and wrongfully classified Plaintiff’s criminal record  
21 as “increasingly more serious.” (Mot. Am. at 4, ECF No. 93); (First Am. Compl. at 9–10, 14–  
22 15, ECF No. 11). These allegations align with the Nevada Supreme Court’s holding in  
23 *Anselmo v. Bisbee*, and thus may serve as a viable basis for a due process claim due to alleged  
24 application of inapplicable aggravating factors during consideration of parole. *See Anselmo*,  
25 396 P.3d at 853 (“[E]ligible Nevada inmates have a statutory right to be considered for parole

1 by the Board . . . [and] [t]his court cannot say that an inmate receives proper consideration  
2 when the Board's decision is based in part on an inapplicable aggravating factor.”).<sup>3</sup>

3 Because Plaintiff alleges a viable due process cause of action, the Court must then  
4 consider whether that claim can proceed against the Parole Board Defendants, which the Court  
5 previously found to be absolutely immune from Plaintiff's suit. (*See* Order 13:11–14:9, ECF  
6 No. 88). Upon reconsideration, the Court reaffirms its finding that the Parole Board  
7 Defendants are absolutely immune from Plaintiff's due process claim to the extent that Plaintiff  
8 seeks monetary damages. However, absolute immunity does not extend to injunctive relief  
9 against the Parole Board Defendants. *Thornton v. Brown*, 757 F.3d 834, 840 (9th Cir. 2013);  
10 *Tripp v. Bisbee*, 670 F. App'x 494, 495 (9th Cir. 2016). Plaintiff accordingly can proceed with  
11 his due process claim for injunctive relief based on the Parole Board Defendants' alleged  
12 failure to provide proper consideration for Plaintiff's parole; and the Parole Board Defendants  
13 are reinstated as parties in this suit. *See Anselmo*, 396 P.3d at 853.

14 Alongside Plaintiff's claim that the Parole Board Defendants failed to follow their own  
15 internal guidelines, Plaintiff asserts an additional basis for a due process claim in his Motion to  
16 amend the Court's prior order.<sup>4</sup> (*See* Second Am. Compl. at 19–20, ECF No. 87-1); (Mot. Am.  
17 at 7–9, ECF No. 93). Plaintiff's new basis argues that the Parole Board Defendants, during  
18 Plaintiff's parole hearings, considered an improper risk assessment provided by the NDOC.  
19 (*See* Second Am. Compl. at 14–15, ECF No. 87-1) (discussing the NDOC's allegedly  
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21 <sup>3</sup> Notably, the Board of Parole Commissioners considered Plaintiff's allegations that it misapplied its own  
22 internal guidelines during Plaintiff's prior parole hearings, and the Board states that it took actions to correct  
23 those mistakes. (Letter, ECF No. 27-3). The outstanding issue, however, is whether the Board rectified all  
mistakes so that they do not improperly impact Plaintiff's future parole hearings.

24 <sup>4</sup> This new basis for a due process claim arises from Plaintiff's proposed Second Amended Complaint, which the  
25 Court has not granted leave to file. Nevertheless, because this new basis has been briefed by the parties, the  
Court now considers whether Plaintiff can assert a new due process claim if he were granted leave to file a  
Second Amended Complaint. However, the Court will not consider the remaining claims in the proposed  
Second Amended Complaint until Plaintiff has been granted leave to file that pleading.

1 unauthorized risk assessment of Plaintiff); (*see* Mot. Prelim. Inj. at 5, ECF No. 92). According  
2 to Plaintiff, that improper risk assessment labeled him as a “high” risk to re-offend, whereas  
3 other assessments from the parole board labeled him as a “moderate risk.” (*See* Second Am.  
4 Compl. at 21, ECF No. 87-1); (*see* Mot. Prelim. Inj. at 5–6, ECF No. 92). Plaintiff argues that  
5 under NDOC Administrative Regulation 537 (“AR 537”), this high-risk assessment from the  
6 NDOC should never have existed because AR 537 does not authorize officials to conduct a risk  
7 assessment when an inmate’s parole will not result in release. (*See* Second Am. Compl. at 21,  
8 ECF No. 87-1); (*see* Mot. Prelim. Inj. at 5–6, ECF No. 92).

9         The Court finds that Plaintiff has not articulated a basis under AR 537 to support a due  
10 process claim against the Parole Board Defendants. First, AR 537 does not prohibit the NDOC  
11 from conducting a risk assessment of Plaintiff before a parole hearing. *See* NDOC Admin. Reg.  
12 537.03(B) (stating “certification cannot be required before [a prisoner] is institutionally paroled  
13 to his consecutive sentence”; but placing no bar on the NDOC’s ability to conduct a risk  
14 assessment). Second, NRS 213.1214(3) permits the NDOC to conduct the risk assessment if  
15 doing so “may assist the Board in determining whether parole should be granted or continued.”  
16 Nev. Rev. Stat. 213.1214(3). Similarly, the Parole Board Defendants properly considered the  
17 NDOC’s assessment under Nevada Administrative Code 213.514(3) during Plaintiff’s parole  
18 hearings. *See* Nev. Admin. Code 213.514(3) (permitting a parole board to use a risk assessment  
19 from a “currently accepted standard”); *Coles v. Bisbee*, 422 P.3d 718, 720 (2018).  
20 Accordingly, Plaintiff’s basis for a due process violation under AR 537 is not consistent with  
21 *Anselmo v. Bisbee*, 396 P.3d 848, 853 (Nev. 2017), because this new basis does not identify  
22 how the Parole Board Defendants relied on an aggravating factor in violation of procedural  
23 guidelines.<sup>5</sup>

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25 <sup>5</sup> Plaintiff argues that actions which remove parole eligibility violate due process under *Wilkinson v. Austin*, 545  
U.S. 209 (2005). (Mot. Am. at 6, ECF No. 93). Plaintiff then argues that the NDOC’s high-risk assessment  
violated his due process rights because it required the parole board to deny him parole. (*Id.* at 8). First, however,

1                   **B. Motion to Amend Complaint**

2           Plaintiff's Motion to file a Second Amended Complaint states that Plaintiff seeks to  
3 "clarify his arguments" based on "newly discovered evidence." (Mot. Am. Compl. 2:2–6, ECF  
4 No. 87). As explained below, however, Plaintiff has not provided adequate clarification nor  
5 followed the applicable procedural rules to warrant leave to file the Second Amended  
6 Complaint.

7           First, Plaintiff's proposed Second Amended Complaint names parties that the Court  
8 previously explained to be immune from suit. For example, Plaintiff sues the Nevada  
9 Department of Corrections, which is immune from suit as arm of the state of Nevada under the  
10 Eleventh Amendment. (Order 1:19–20 n.1, ECF No. 88); *see, e.g., Franceschi v. Schwartz*, 57  
11 F.3d 828, 831 (9th Cir. 1995).

12           Second, Plaintiff does not comply with the District's Local Rule 7-2, which requires a  
13 motion to have a supporting memorandum of points and authorities. Dist. Nev. L.R. 7-2. While  
14 Plaintiff includes a single page labeled "memorandum of points and authorities," that page  
15 includes only three conclusory sentences stating Plaintiff has obtained "newly discovered  
16 evidence" and that some of his claims "are no longer relevant." (Mot. Am. Compl. 2:2–6, ECF  
17 No. 87). Plaintiff's motion does not provide an explanation of what new evidence he  
18 discovered, which claims are no longer relevant, and how the Second Amended Complaint adds  
19 to the First Amended Complaint. *See Crawford v. Kroger Co.*, No. 2:18-cv-01156-APG-CWH,  
20 2019 WL 188422, at \*2 (D. Nev. Jan. 14, 2019).

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23 the Court in *Wilkinson v. Austin* found a liberty interest under a combination of deprivations, not simply a  
24 removal of parole eligibility. *See* 545 U.S. at 223–24. Thus, the holding in *Wilkinson v. Austin* is inapplicable to  
25 the facts here. Second, Nevada has not created a due process right to parole. Nev. Rev. Stat. 213.10705. Thus,  
while the NDOC's risk assessment impacts Plaintiff's eligibility for parole, it does not impact a liberty interest  
that can support a due process claim against the Parole Board Defendants. *See, e.g., Fernandez v. Nevada*, No.  
3:06-CV-00628-LRH-RA, 2009 WL 700662, at \*10 (D. Nev. Mar. 13, 2009) (analyzing NRS § 213.1214, and  
explaining "where there is no liberty interest in parole, there is no liberty interest in parole eligibility").



1 The Court thus denies Plaintiff's Motion for leave to file a Second Amended Complaint.  
2 Nevertheless, Plaintiff may be able to correct these identified deficiencies. Therefore, Plaintiff  
3 may, if he elects to do so, refile his motion in accord with the decisions in this Order and in a  
4 format that complies with the Court's local rules.

### 5 **C. Motion for Preliminary Injunction**

6 In Plaintiff's Motion for Preliminary Injunction, he seeks to preclude Defendants from  
7 improperly considering Plaintiff's prior conviction as being under NRS § 213.1255 and from  
8 using the "high" risk assessment provided by the NDOC. (Mot. Prelim. Inj. at 5, ECF No. 92).  
9 Plaintiff accordingly requests that the Court order an immediate re-hearing for Plaintiff's parole  
10 based on proper standards in the Board of Parole Commissioners' internal guidelines. (*Id.* at 8).

11 Injunctive relief, whether temporary or permanent, is an "extraordinary remedy, never  
12 awarded as of right." *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 24 (2008). "A  
13 plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the  
14 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
15 balance of equities tips in his favor, and that an injunction is in the public interest." *Am.*  
16 *Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting  
17 *Winter*, 555 U.S. at 20). Further, under the Prison Litigation Reform Act ("PLRA"),  
18 preliminary injunctive relief must be "narrowly drawn," must "extend no further than necessary  
19 to correct the harm," and must be "the least intrusive means necessary to correct the harm." 18  
20 U.S.C. § 3626(a)(2).

21 Here, Plaintiff's Motion for a Preliminary Injunction relies, in part, on the likelihood of  
22 success with his due process claim that the NDOC improperly conducted a risk assessment of  
23 Plaintiff under AR 537. (*See* Mot. Prelim. Inj. at 5–6, ECF No. 92). However, as previously  
24 explained in this Order, Plaintiff has not established a likelihood of success on the merits of that  
25 due process theory.

1           Additionally, Plaintiff has not established a likelihood of irreparable harm without  
2 preliminary injunctive relief. To explain, the Court's prior Order denied Plaintiff's previous  
3 request for preliminary injunctive relief because Plaintiff would ultimately receive a parole  
4 hearing this year. (Order 17:3–5, ECF No. 88). According to Plaintiff, that parole hearing is  
5 still scheduled to occur. (*See* Mot. Prelim. Inj. at 15, ECF No. 92). Plaintiff will therefore  
6 receive the hearing that he seeks, regardless of court intervention. Further, since parole is not a  
7 right under Nevada law, Plaintiff has not shown an irreparable harm were he to not receive  
8 immediate injunctive relief and instead had to serve his sentence while proving the merits of his  
9 claims during the pendency of this lawsuit. *See State, ex rel. Bd. of Parole Comm'rs v. Morrow*,  
10 255 P.3d 224, 228 (Nev. 2011). Accordingly, the Court denies Plaintiff's motion for a  
11 preliminary injunction.<sup>6</sup>

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24 <sup>6</sup> Also pending before the Court are Plaintiff's Motion for Oral Arguments on Preliminary Injunction, (ECF No.  
25 Defendants from being named in Plaintiff's Motion for a preliminary injunction. Because the Court denies  
Plaintiff's Motion for Preliminary Injunction, (ECF No. 92), the Court then denies Plaintiff's Motion for Oral  
Arguments, (ECF No. 89), and Parole Board Defendants' Motion to Strike, (ECF No. 97), as moot.

1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Alter or Amend Order, (ECF  
3 No. 93), is **GRANTED in part**, and **DENIED in part**.


4 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Leave to File Second  
5 Amended Complaint, (ECF No. 87), is **DENIED without prejudice**.

6 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Preliminary Injunction, (ECF  
7 No. 92), is **DENIED**.

8 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Oral Argument on  
9 Preliminary Injunction, (ECF No. 89), is **DENIED as moot**.

10 **IT IS FURTHER ORDERED** that the Parole Board Defendants' Motion to Strike,  
11 (ECF No. 97), is **DENIED as moot**.

12 **DATED** this 25 day of February, 2019.

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16 Gloria M. Navarro, Chief Judge  
17 United States District Court  
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